

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2) (b))

Description of Case

**Criminal Appeal No. 488 of 2001
(Old No. 1784 of 1990)**

Date of decision : 16th May, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 16.05.2007

Initials of Judge

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

**Criminal Appeal No. 488 of 2001
(Old No. 1784 of 1990)**

1. Narayan Singh
S/o Shri Natha Singh
R/o Village Sokari
Patwari Chhetra Guptakashi
Tehsil Ukimath,
District Chamoli
 2. Dayal Singh
S/o Shri Murli Singh
R/o Village Sokari
Patwari Chhetra Guptakashi
Tehsil Ukimath,
District Chamoli
 3. Virendra Singh'
S/o Shri Bhoopal Singh
R/o Village Sokari
Patwari Chhetra Guptakashi
Tehsil Ukimath,
District Chamoli
 4. Darwan Singh
S/o Shri Shiv Singh
R/o Village Sokari
Patwari Chhetra Guptakashi
Tehsil Ukimath,
District Chamoli
 5. Murli Singh
S/o Shri Roop Singh
R/o Village Sokari
Patwari Chhetra Guptakashi
Tehsil Ukimath,
District Chamoli
- Appellants

Versus

State of U.P.

....Respondent

Mr. S.K. Mishra, learned Amicus Curiae for the appellants
Mr. G.S. Sandhu, Govt. Advocate for the respondents

**Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.**

Per Hon'ble J.C.S. Rawat, J.

1. This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (for brevity hereinafter referred as

Cr.P.C.), is directed against the judgment and order dated 27.08.1990, passed by learned Session Judge, Chamoli in Sessions Trial No. 5 of 1989, whereby appellants have been convicted & sentenced to undergo life imprisonment and two year's R.I. under section 302/149 Indian Penal Code, 1860 (for brevity hereinafter referred as I.P.C.) and section 147 I.P.C. respectively.

2. Brief facts of the case are that Daulat Singh PW2 lodged an F.I.R. (Ext.Ka.1) in the Police Chawki Gupatkashi alleging therein that on 01.10.1988 at about 8:00 p.m., he was coming from Guptakashi market to his village alongwith Bachan Singh PW5 and deceased Bhajan Singh. When they reached behind the house of Gabar Singh, all of a sudden, the accused persons armed with lathi, daranti and stone appeared on the road and assaulted the deceased Bhajan Singh. While trying to save the deceased Bhajan Singh, Daulat Singh PW2 also received injuries on his person. The deceased Bhajan Singh succumbed to his injuries at the place of occurrence. Thereafter the dead body of the deceased was taken to his home. On the basis of the F.I.R., Chick report (Ex.Ka.4) was prepared and case crime No. 13 of 1988 was lodged at Police Station Ukhimath vide Ex.Ka.5 and Ex.Ka.6. The case was initially investigated by Shri Laxmi Prasad Nautiyal, Naib Tehsildar PW6. He visited the place of occurrence on 02.10.1988 and prepared the Panchnama Ex.Ka.7 of the dead body. The Investigating Officer then sent the dead body of the deceased to Gopeshwar where post mortem was conducted. Thereafter, on 05.10.1988, he visited the place of occurrence and recorded the statement of Daulat Singh PW2. The Investigating Officer also prepared site plan Ex.Ka.9. Thereafter, the further investigation of

this case was entrusted to Shri Bal Bhadra Singh, Patwari, who recorded the statement of other witnesses and conducted the further investigation. After completing the investigation, he submitted the chargesheet (Ex.Ka. 16) before the court.

3. The accused/appellants were charged u/s 302/149 and 147 I.P.C. The accused/appellants denied the charges and claimed to be tried.

4. The prosecution in support of its case examined Indra Devi PW1, wife of the deceased; Daulat Singh PW2, brother of the deceased; Dr. Praveen Mishra PW3 who has stated that Narayan Singh accused was brought in the hospital in injured condition by Ranjit Singh and Birendra Singh, he also examined Daulat Singh and found injuries on his person; H.C. Santa Singh PW4, a formal witness who prepared the report and recorded the G.D. thereof; Bachan Singh PW5, an employee of Sahakari Samiti, Guptakashi was examined by the prosecution. Initially Shri L.P. Nautiyal PW6 investigated the case and thereafter the investigation was transferred to Shri B.B. Singh, Patwari PW8 who completed the investigation and submitted the chargesheet after completion of the investigation. Dr. C.P. Tiwari PW7 conducted the autopsy on the dead body of the deceased.

5. The accused/appellants were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated due to enmity.

6. The learned Sessions Judge on appreciation of the evidence in the case held the appellants-accused guilty of the

offences charged against them and convicted and sentenced them as mentioned above.

7. We have heard Sri S.K. Mishra, learned Amicus Curiae for the appellants; Mr. G.S. Sandhu, Government Advocate for the respondent and perused the record.

8. At the outset, it needs to be mentioned here that it is not disputed that the deceased Bhajan Singh died on account of the injuries sustained by him on the date of the occurrence. The post mortem report Ex.Ka. 13 of the deceased reveals that the death occurred due to the shock and hemorrhage as a result of ante mortem injuries. The autopsy on the body of the deceased was conducted on 03.10.1988 at about 12.45 p.m. by Dr. C.P. Tiwari PW7. The following ante mortem injuries were found on the person of the deceased :-

Contusion size 8 cm. X 6 cm. At left temporal region 3.5 cm. Above the left ear.

Contusion 2.5 cm. X 1.5 Cm. in size bluish red in appearance at cubital fossa at the left arm.

Left temporal bone fractured. The Doctor has further opined that the death of the deceased could have occurred on 01.10.1998.

9. Now, we have to consider whether the accused-appellants are responsible for the offence charged against them. It is also pertinent to mention here that according to the prosecution evidence accused-appellants Virendra Singh and Narayan Singh had lathis in their hands and the other accused-appellants were standing on the road nearby the place of incident. In view of the above, firstly we will

consider the case of accused-appellants Virendra Singh and Narayan Singh. Thereafter, we will separately consider the case of the second set of rest of the accused-appellants.

10. The prosecution has adduced the evidence of Daulat Singh PW2 who is said to be the eyewitness of the incident. He is the brother of the deceased. He has stated in his evidence that the deceased Bhajan Singh after his retirement has been residing in his village and was leading a retired life there. He has further stated that the appellants-accused used to distill illicit liquor at their residence and the deceased used to protest against the same. It was alleged that on 01.10.1988 at about 8:00 p.m., Daulat Singh PW2, Bhajan Singh deceased and Bachan Singh PW5 were coming from Guptakashi market to their respective villages. When they reached behind the house of Gabar Singh, the appellants-accused appeared all of a sudden on the road. Accused Narayan Singh and Virender Singh has lathis in their hands and they started dealing lathi blows on Bhajan Singh. Daulat Singh PW2 tried to save Bhajan Singh but the accused-appellants did not accede to his request. He also sustained injuries while saving the deceased from the assaults of the appellants-accused. Accused Murli Singh threatened Daulat Singh PW2 and the other accused Dayal Singh and Darban Singh remained standing on the side of the road. The accused-appellants Narayan Singh and Virendra Singh also threatened Daulat Singh PW2 that they would take the dead body of the deceased; they would bury it and they would also cause injuries on him. Deceased Bhajan Singh sustained multiple injuries on his person. Blood was oozing from the injuries of Bhajan Singh who succumbed to his injuries at the spot.

12. The Daulat Singh PW2 also sustained injuries in the incident while he was trying to save Bhajan Singh. Daulat Singh PW2 was medically examined by Dr. Praveen Mishra PW3 in the morning of 02.10.1988 who found the following injury on his person :-

An abrasion 5 cm. x 1 cm. on left leg. Clotted blood present. Direction is vertical. Present in front of leg 15 cm. below left knee joint.

According to Dr. Praveen Mishra PW3, the injury sustained by the injured Daulat Singh PW2 was simple in nature and it may be caused by a blow from blunt object or by friction against hard object. He found the duration of the injury less than 24 hours. Dr. Praveen Mishra PW3 had also stated in his deposition that the accused-appellants Narayan Singh was brought on 01.10.1988 at about 10:45 p.m. in injured condition by Ranjit Singh and one Virendra Singh. Dr. Praveen Mishra PW3 was of the opinion that it was medico legal case, so he referred the matter to the police station Okhimath vide Ex.Ka.2. Dr. Praveen Mishra PW3 further stated in his evidence that when the police reached at the P.H.C. in pursuance of the letter Ex.Ka.2 of the Doctor by that time, the injured had left the P.H.C. (hospital).

12. The prosecution also adduced the evidence of Smt. Indra Devi PW1 who is the wife of the deceased. She has stated in her deposition that her husband went to Guptakashi in the evening of 01.10.1988. After the departure of her husband to Guptakashi, the accused-appellants also went towards Guptakashi. In the evening at about 7:00 p.m. she was working in her Gaushala. When she came out from

Gaushala, she heard the cries of Daulat Singh PW2. She went in that direction and found Daulat Singh PW2, accused-appellants Narayan Singh, Dayal Singh, Virendra Singh, Darban Singh and Murli Singh at the place of occurrence. The accused-appellants Narayan Singh and Virendra Singh were having lathis in their hands. She also found that her husband was lying on the ground in injured condition. Thereafter, the accused-appellants fled away from the spot. She inquired about the incident from Daulat Singh PW2. He told her that accused-appellants Virendra Singh and Narayan Singh had caused injuries on her husband. Thereafter, Daulat Singh PW2 and other person brought the body of the deceased Bhajan Singh to his house. Thus Indra Devi PW1 is not an eye witness of the incident. She reached at the spot immediately after the incident and she found that the accused were standing there. Out of five accused, Virendra Singh and Narayan Singh had lathis in their hands. The body of deceased Bhajan Singh was lying on the ground and Daulat Singh PW2 narrated the entire incident to her.

13. The prosecution also adduced the evidence of Bachan Singh PW5 who has stated in his evidence that deceased Bhajan Singh, Daulat Singh PW2 and he himself were coming to their village after closing his shop at Guptakashi. He has a Sahakari Samiti Shop at Guptakashi. He was carrying cash of the shop with him at the time of incident. When deceased Bhajan Singh reached at the place of occurrence, the accused-appellants Virendra Singh and Narayan Singh appeared at the place of incident and a quarrel took place in between deceased Bhajan Singh, Narayan Singh and Virendra Singh. Daulat Singh PW2 was also there. Bachan Singh PW5 asked them as to why they were quarrelling with deceased

Bhajan Singh. Accused Virendra Singh reacted by saying that you were also supporting deceased Bhajan Singh. Bachan Singh PW5 then stated that he was not supporting anyone. As he was carrying cash with him, he preferred to leave the place of occurrence. When Bachan Singh PW5 was going to his home, he informed about the incident to Indra Devi, wife of the deceased. Indra Devi PW1 immediately reached at the spot. Thereafter, Daulat Singh PW2 came to house of Bachan Singh PW5 and informed him that Bhajan Singh has been killed by accused-appellants Virendra Singh and Narayan Singh. They went to the house of the deceased Bhajan Singh where his dead body was kept and found that Bhajan Singh died due to the injuries sustained by him in the incident. Bachan Singh PW5 also accompanied Daulat Singh PW2 to the Patwari Chowki Guptakashi. Daulat Singh PW2 got the report written by Bachan Singh PW5 in the night but the report could be lodged on the next morning only at the police station Okhimath due to the strike of Patwaries.

14. Learned counsel for the appellants contended that the evidence of the prosecution witnesses is not reliable as they are related to the deceased. Learned G.A. refuted the contention. It is true that the witnesses are related to the deceased as Daulat Singh PW2 is the brother of the deceased; Bachan Singh PW5 is also related to the deceased and Indra Devi PW1 is wife of the deceased. If the witnesses are related to the deceased, their evidence cannot be discarded on this ground alone. There is no Rule of law or prudence which requires that the evidence of a close relation must be discarded for the simple reason that the witness / witnesses is / are related to the deceased / injured. Indra Devi PW1, Daulat Singh PW2 and Bachan Singh PW5, being

close relatives of the deceased, would be the last persons on earth to spare the real assailants of deceased Bhajan Singh and to falsely implicate the accused in the murder of the deceased. In such circumstances, it would not be just and proper to discard their evidence on account of their relationship with the deceased.

15. It was further contended by the learned counsel for the appellants that the prosecution did not examine independent witnesses. It was further contended that Indra Devi PW1 has admitted in her evidence that several persons of the village were working in their Gaushala and they could have been produced before the Court to corroborate the testimony of the related witnesses. It was further pointed out that the incident took place on the main road; the prosecution witnesses have admitted that number of person were passing through this road and those could have been produced before the Court to corroborate the testimony of related witnesses. It was further pointed out that Indra Devi PW1 has admitted that 10-12 families reside near their house in the village but none of them was produced before the Court. Learned G.A. refuted the contention. It is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not quantity which matters. If the evidence available on record is otherwise satisfactory in nature and trustworthy then increase in the number of the witnesses cannot be the requirement of law. If the prosecution establishes the guilt of appellants beyond reasonable doubt, there is no need to produce the other evidence in the case. The witnesses if they are participating in that event their evidence cannot be thrown outrightly on the ground that the

other witnesses, have not been produced. If the witnesses are trustworthy, it is not required that there should be a multiplicity of the evidence. **{See Komal and others Vs. State of U.P. 2002 SCC (Cri) 1600 and Babu Ram Vs. State of U.P., 2002 SCC (Cri) 1400}** We, therefore, do not find any force in the above submission of the learned counsel for the appellants.

16. In the instant case, the evidence of the prosecution witnesses is consistent with regard to accused Virender Singh and Narayan Singh, Daulat Singh PW2 was cross-examined at length but nothing could be elicited to discredit his testimony. He is an injured eyewitness who sustained injuries in the same incident. The evidence of injured witness stands on a higher pedestal than any other witness. The **Apex court in the case of Narendra Nath Khaware Vs. Parasnath Khaware and others 2003 SCC (Cri) 1144** held that the injured witnesses are most competent witnesses and their presence at the place of occurrence cannot be ruled out. They stand on a higher pedestal than the other witnesses. Daulat Singh PW2 categorically stated in his evidence that accused Virendra Singh and Narayan Singh had lathis in their hands and they assaulted the deceased. Thus the evidence of eyewitness cannot be washed off merely on the ground that other Independent witnesses have not been produced. Apart this, it is a matter of common experience that in recent times the independent witnesses are not inclined to depose or they remain indifferent to give evidence on the ground that they do not have courage to depose against the accused person because of threats to their life. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an

unrealistic approach. It has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are a harassed lot. They are being threatened, intimidated and at the top of all they are subjected to unnecessary lengthy cross-examination. So, independent witnesses avoid to come to the court.

17. The evidence of injured eyewitness Daulat Singh PW2 finds corroboration from the evidence of Indra Devi PW 1 and Bachan Singh PW5. Bachan Singh PW5 had categorically stated in his evidence that both the accused Narayan Singh and Virendra Singh were quarrelling with deceased Bhajan Singh and he tried to pacify them but they did not yield to his request. He could not stay at the place of occurrence as he was carrying cash with him. He immediately went to his residence. Indra Devi PW1 who had reached at the spot immediately after the incident saw accused Virendra Singh and Narayan Singh having lathis in their hands and the deceased was lying on the ground. Thus, the evidence of prosecution witnesses is credible and cogent and as such can be safely acted upon.

18. Learned counsel for the accused-appellants further contended that there are major contradictions in the statements recorded u/s 161 of the Cr.P.C. by the Investigation Officer and the evidence of the witnesses before the trial court. Learned G.A. refuted the contention and contended that minor discrepancies are bound to creep in the testimony of truthful, natural and reliable witnesses when they speak about the details. We have gone through the

entire evidence and the contradictions pointed out by the learned counsel for the appellants. Unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. It is quite natural that the persons narrate the story in different ways and in different words at different times. The witnesses are villagers and they have their own notions about the narration of the facts. The minor discrepancies are bound to creep in the testimony of natural and reliable witnesses. The minor discrepancies in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected from the normal person. The discrepancies which have been pointed out by the learned counsel for the accused-appellants in the evidence are on account of normal errors of memory due to mental disposition due to the death of their nearest relative. Such discrepancies are normal in the truthful depositions. By and large the people cannot accurately recall the sequence of the events which took place in short span and reproduce the sequence of events before the Investigating Officer or the Court. They can only recall the main purport of the incident. It is unrealistic to expect a witness to be a human tape-recorder or video camera. The witnesses cannot be expected to pose a photographic memory and to recall the details of an incident. The witnesses are overtaken by the incident because they could have not anticipated the occurrence which show after as an element of surprise. In the instant case, the witnesses have narrated the main purport of the incident. The prosecution witnesses cannot be expected to recall

accurately the sequence of the events which took place in a rapid succession or short span of time. A witness is likely to get confused or mixed up when interrogated later on. It cannot be expected from the witness to narrate the incident with mathematical niceties in criminal cases. The contradictions as pointed out by the learned counsel for the accused-appellants are of minor nature and these contradictions and inconsistency do not render the evidence of the prosecution witnesses including eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

19. Learned counsel for the accused-appellants further contended that the prosecution has failed to establish the place of incident. Learned counsel for the accused-appellants further contended that the Investigating Officer has not shown the place where the accused-appellants assembled and were waiting for the deceased for the commission of the offence. Learned G.A. refuted the contention and contended that the prosecution has established by cogent and credible evidence that the accused-appellants were hiding themselves at the place of incident. They were waiting for the deceased to come at the place and to cause injuries on him. According to Daulat Singh PW2 and Bachan Singh PW5, when deceased Bhajan Singh reached behind the house of Gabar Singh, the accused-appellants appeared all of a sudden on the road and accused-appellants Virendra Singh and Narayan Singh caused injuries on the deceased. The witnesses have categorically proved the place of occurrence in their evidence. The F.I.R. was lodged by Daulat Singh PW2 and it was scribed by Bachan Singh PW5. The F.I.R. clearly indicates that when the deceased and both the witnesses reached near

the house of Gabar Singh, the accused-appellants, all of a sudden, appeared before the deceased and they caused injuries to the deceased who succumbed to his injuries at the spot. The F.I.R. itself states the fact that the accused-appellants were also hiding themselves at the place of the occurrence. The site plan prepared by the investigating Officer is only admissible to the extent what the Investigating Officer has personally seen and noted. The fact which has been stated by the witnesses to the Investigating Officer at the spot is not admissible in evidence and is clearly hit by Section 162 Cr.P.C.. Even if the Investigating Officer would have mentioned the place where the accused persons were hiding themselves in the site plan, the same would have been hit by Section 162 of the Cr.P.C. In the case of **State of Rajasthan Vs. Bhawani & another 2003 (7) SCC (Cri) p/291**, the Apex Court has held as under:-

“11. The High Court has extensively relied upon the site plan prepared by the investigating officer for discarding the prosecution case and for this purpose has referred to the place from where the accused are alleged to have entered the nohara, the place from where they are alleged to have fired upon the deceased and also has drawn an inference that the place wherefrom the accused are alleged to have fired upon the deceased, the shot could not have hit the houses on the eastern side of the nohara. Many things mentioned in the site plan have been noted by the investigating officer on the basis of the statements given by the witnesses. Obviously, the place from where the accused entered the nohara and the place from where they

*resorted to firing is based upon the statement of the witnesses. These are clearly hit by section 162 CrPC. What the investigating officer personally saw and noted alone would be admissible. This legal position was explained in **Tori Singh Vs. State of Up AIR 1962 SC 399 in the following words:**_ “A rough sketch map prepared by the Sub-Inspector on the basis of statements made to him by witnesses during the course of investigation and showing the place where the deceased was hit and also the places where the witnesses were at the time of the incident would not be admissible in evidence in view of the provisions of section 162 CrPC, for it is in effect nothing more than the statement of the Sub-Inspector that the eyewitnesses told him that the deceased was at such and such place at the time when he was hit. The sketch map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of section 162 CrpC as it will be no more than a statement made to the police during investigation. Therefore, such marks on the map cannot be used to found any argument as to the improbability of the deceased being hit on that part of the body where he was actually injured, if he was standing at the spot marked on the sketch map.”*

Thus the place of occurrence and the place where the accused-appellants were waiting for deceased Bhajan Singh

and appeared all of a sudden to cause injuries to the deceased has been established by the credible and cogent evidence of Indra Devi PW1, Daulat Singh PW2 and Bachan Singh PW5. As such, we do not find any force in the contention of the learned counsel for the appellants.

20. Learned counsel for the appellants further contended that the accused-appellant Virendra Singh has stated in his statement u/s 313 Cr.P.C. that he has been ploughing the field of Daulat Singh PW2 for the last 11-12 years. The deceased Bhajan Singh and Daulat Singh PW2 did not settle his account due towards them so he left the job. Due to this accused-appellants were annoyed with him. The accused-appellant Narayan Singh had stated in his statement recorded u/s 313 Cr.P.C. that he had no children, brothers and he was alone in his family. Daulat Singh PW2 and deceased Bhajan Singh asked him to give his land to them some time prior to the incident. As he did not yield to their request so they were annoyed with him and they have falsely implicated him due to this enmity. Learned counsel for the accused-appellants tried to emphasise that Daulat Singh PW2 and the deceased Bhajan Singh wanted to grab the land of the accused so he had been falsely implicated in this case. Learned G.A. refuted the contention and contended that the accused-appellants Virendra Singh and Narayan Singh have categorically admitted the enmity. If the accused-appellants had not given land to Daulat Singh PW2 and the deceased Bhajan Singh, the grievance would have been to the deceased Bhajan Singh and Daulat Singh PW2 to cause the injury to the accused-appellant Narayan Singh to eliminate him from their way and to grab his land. In view of the above, we are of the opinion

that the said enmity as stated by the learned counsel for the accused-appellants is of no avail to the defence.

21. So far as motive is concerned, there is evidence of Daulat Singh PW2 and Indra Devi PW1 that the accused-appellants used to distill illicit liquor in the village for which the deceased protested and asked them not to do so. It is also pertinent to mention here that the accused-appellant Virendra Singh used to live in a part of the same house where the deceased had been living. The accused-appellant Virendra Singh also told the deceased Bhajan Singh to distill the illicit liquor but the deceased did not yield to his request. It is also in the evidence that the deceased Bhajan Singh called Patwari in his house in this connection immediately before the incident. There was sufficient motive to cause injuries to deceased Bhajan Singh as he used to ask the accused-appellants not to distill illicit liquor in his house and in this connection the deceased has also called Patwari (Revenue Police) in his house. Thus this must have been the immediate cause of annoyance to cause injuries to the deceased Bhajan Singh. The evidence of the prosecution is totally credible and cogent in this regard. Nothing could be elicited in the cross examination of the witnesses to discredit the evidence of prosecution. Even assuming that the prosecution had not put forward any motive on the part of the accused-appellants to commit the crime, it would not reflect upon the credibility of the witnesses. It is well settled principle of law that if the ocular evidence is reliable, satisfactory and convincing then the absence of motive becomes irrelevant for the decision of the case. It is also well settled that establishment of motive is not sine quo non for

proving the prosecution case. It was held in **Yunus Vs. State of M.P. SCC 2003 (1) p/429:-**

“The prosecution in the present case has failed to prove the motive. Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is also well settled law that establishment of motive is not sine quo non for proving the prosecution case.”

In the case in hand, the prosecution has established the motive for the commission of the offence.

22. The prosecution story is further corroborated by the evidence of Dr. C.P. Tiwari PW7 who conducted the autopsy on the dead body of the deceased on 03.10.1988. He found that the death of the deceased was caused due to shock and hemorrhage as a result of ante mortem injuries as has been indicated in para 8 of the judgment. The doctor has opined that the duration of the injuries was two days old and injuries could have been caused by blunt object like lathi and danda. The medical evidence corroborates the evidence of the eye witnesses. Learned counsel for the defence tried to emphasize that the said injuries could be caused by fall on the hilly side. It was also suggested that the deceased has consumed liquor and as such, he fell down on the road side and sustained the injuries. The accused-appellants had not put any question to the Doctor who conducted the post mortem as to whether he found any sign of alcohol in the body of the deceased. Therefore, the theory which has been

put forward by the defence is not reliable and the evidence of the prosecution as against this is totally credible and cogent.

23. It was further contended that there are certain lacunae in the investigation. It was pointed out that the deceased sustained injuries and he succumbed to his injuries at the place of the incident but the Investigating Officer has neither taken the blood stained soil from the spot nor the Investigating Officer has taken into possession cloth of the witnesses who carried the dead body from the place of the incident to the house of the deceased where it was kept. Learned A.G.A. refuted the contention. Failure to seize the blood stained soil and clothes is only the remissness on the part of the Investigating Officer and the evidence of the prosecution witnesses would not be impaired in any way. Even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting the accused solely on account of the defect; to do so would tantamount to play into the hands of the investigating officer if the investigation is designedly defective. **{See Dhanaj Singh Alias Shera & others Vs. State of Punjab 2004 (3) SCC p/654, Chhotu Vs. State of Maharashtra 1997 Cri.L.J. 4394 (SC) and Karnel Singh Vs. State of M.P. 1995 Cri.L.J. 4173}**

24. It was further contended that from the facts and circumstances of the case, no offence u/s 302 I.P.C. is made out against the aforesaid two appellants i.e. Virendra Singh and Narayan Singh. It was further contended that at the most even if the evidence was found credible against them,

the offence punishable u/s 304 I.P.C. is only made out against them. As we have pointed out earlier that the accused-appellants Virendra Singh and Narayan Singh had a common intention to kill the deceased Bhajan Singh and they wielded lathis upon the deceased who succumbed to his injuries at the spot. He sustained fracture of left temporal bone which is a vital part of the body. Now, we have to consider whether they had an intention to cause the death of the deceased or not. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. In this case, as we have noticed the accused-appellants Virendra Singh and Narayan Singh were carrying lathis in their hands a dangerous weapon. The deceased Bhajan Singh was unarmed. There was no provocation sudden quarrel or mutual fight. There was no indication of any cause for an apprehension on the part of the accused-appellants that the deceased may attack them. The lathi blows were dealt with great force on left temporal

part of the deceased Bhajan Singh, causing such injury on a vital part of the body, which was sufficient in the ordinary course of nature to cause death. The intention to cause the death or at all events intention of causing bodily injury which is sufficient in the ordinary course of nature to cause death was made out. Considering the evidence in the light of the above, we are of the opinion that the case does not fall under section 304 I.P.C. We are of the opinion that the accused/appellants Virendra Singh and Narayan Singh had committed the offence punishable u/s 302 I.P.C. Therefore, the trial court has rightly convicted the appellants Virendra Singh and Narayan Singh u/s 302 I.P.C.

25. Now, we will deal with the evidence with regard to the rest of the accused-appellants viz. Dayal Singh, Darban Singh and Murli Singh with regard to their alleged involvements in the case. According to F.I.R., the accused-appellants Dayal Singh, Darban Singh and Murli Singh were accompanying the accused-appellants Narayan Singh and Virendra Singh. They were waiting for the deceased by hiding themselves by the side of the road. Their presence is not established by credible and cogent evidence of the prosecution. As per Bachan Singh PW5 who was also an eyewitness had categorically stated in his evidence that when he reached at the place of incident, he saw accused-appellants Narayan Singh and Virendra Singh were quarrelling with the deceased Bhajan Singh. Daulat Singh PW2 and Bachan Singh PW5 also reached there when the quarrel was going on. Thereafter, accused-appellants Murli Singh also reached at the spot who tried to settle the matter. Daulat Singh PW2 had stated in his evidence that accused-appellants Dayal Singh, Darban Singh and Murli Singh were standing on the road. He has not

stated that they were participating in the incident. Thus the presence of the accused-appellants Dayal Singh, Darban Singh and Murli Singh at the place of occurrence is doubtful. To constitute the offence punishable u/s 147 I.P.C., it is necessary to show first, that the accused persons, five or more in number formed an unlawful assembly; second, that they were animated by a common unlawful object and third, that force or violence was used by unlawful assembly or any member of it in prosecution of the common object. Whereas u/s 149 I.P.C. if an offence is committed by any member of unlawful assembly in prosecution of the common object of that assembly every person who at the time of the committing that offence is the member of the such assembly would be held guilty of that offence. In both the sections, the accused person must be 5 or more or they should be the member of the unlawful assembly. In the instant case, the presence of accused-appellants Dayal Singh, Darban Singh and Murli Singh at the spot is doubtful. The offence u/s 147 is not proved against accused-appellants Dayal Singh, Darban Singh and Murli Singh. Therefore, the appellants Dayal Singh, Darban Singh and Murli Singh deserve to be acquitted from the charges leveled against them. The conviction and sentence recorded against accused-appellants Dayal Singh, Darban Singh and Murli Singh by the trial court u/s 302/149 and 147 is liable to be set aside.

26. Daulat Singh PW2 injured witness had stated in his evidence that the accused-appellants Narayan Singh and Virendra Singh had lathis in their hands and they caused the injuries on the person of the deceased Bhajan Singh. Bachan Singh PW5 has stated in his evidence that when they reached at the spot both the accused-appellants Virendra Singh and

Narayan Singh started quarrelling with the deceased Bhajan Singh and Daulat Singh PW2. Thus both the accused-appellants have caused the injuries by lathies on the person of the deceased Bhajan Singh and the deceased died at the spot. It is evident from the evidence on record that both the accused-appellants had shared the common intention to cause the death of deceased Bhajan Singh. Section 34 of the I.P.C. recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for conviction of an offence not committed by him but the another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting the offence. Common intension can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case, From the facts and circumstances of this case as narrated above, the accused-appellants Virendra Singh and Narayan Singh had shared the common intention and thus they are liable to be punished u/s 302 read with 34 I.P.C. Therefore, we hold that the prosecution has proved its case against the appellants Virendra Singh and

Narayan Singh that they shared the common intention to commit the murder of the deceased.

27. It is pertinent to mention here that during the pendency of the appeal, appellant No.1 Narayan Singh and appellant No.5 Murli Singh have died. The appeal so far as it relates to appellants No.1 Narayan Singh and appellant No.5 Murli Singh stood abated vide Court's order dated 03.08.2004.

28. In view of the foregoing discussion, the appeal is partly allowed. The conviction and sentence awarded by the trial court against the appellant No. 3 Virendra Singh is modified and he is sentenced to imprisonment for life u/s 302 read with 34 I.P.C. The appellant No.3 Virendra Singh is acquitted for the offence u/s 147 I.P.C. so far as the appellants viz. Dayal Singh and Darwan Singh are concerned, they are acquitted from the charges leveled against them.

29. Let the compliance report be submitted within a period of two months.

(J.C.S. Rawat, J.) (Rajeev Gupta, C.J.)

Dated 16th May, 2007
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